UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

DRAFT

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Compliance with Water Quality Standards in NPDES Permits Issued To Municipal Separate Storm Sewer Systems

FROM: E. Donald Elliott
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General Counsel

TO: Nancy J. Marvel
Regional Counsel
Region IX

In your memorandum of August 9, 1990, you have asked for our views on the following two issues:

ISSUES

1) Must NPDES permits for municipal separate storm sewer systems ("MS4s") issued under Section 402(p)(3)(B) of the Clean Water Act (CWA) include requirements necessary to achieve water quality standards (WQS), as generally required by Section 301(b)(1)(C) for all NPDES permits?

2) If permits issued to MS4s must comply with WQS, by what date must the permit ensure compliance?

SHORT ANSWERS

1) The better reading of Sections 402(p)(3)(B) and 301(b)(1)(C) is that all permits for MS4s must include any requirements necessary to achieve compliance with WQS.

2) Sections 402(p)(4)(A) and (p)(4)(B) give "large" and "medium" MS4s three years to comply with permit conditions from the date of permit issuance. This three year compliance date also applies to WQS-based permit requirements.

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DISCUSSION

1. Statutory Background

Section 402(a)(1) requires that all NPDES permits comply with the applicable provisions of section 301. This includes compliance with appropriate technology-based standards and effluent limits (sections 301(b)(1)(B), 301(b)(2)). In addition, permits must include "any more stringent limitation" necessary to meet WQS. Section 301(b)(1)(C).

As part of the 1987 amendments to the Clean Water Act, Congress added Section 402(p) to the Act, related to storm water discharges. Congress exempted most storm water discharges from the requirement to obtain an NPDES permit until after October 1, 1992. Section 402(p)(1). For certain specific categories of storm water discharges, this permit "moratorium" is not in effect, including discharges "associated with industrial activity," discharges from large and medium municipal separate storm sewer systems (i.e., systems serving a population over 250,000 or systems serving a population between 100,000 and 250,000, respectively). Section 402(p)(2).

For industrial and municipal storm water discharges, EPA was instructed to promulgate new regulations specifying permit application requirements. Congress mandated EPA to issue permits no later than February 4, 1991 (for industrial and large municipal discharges) or February 4, 1993 (for medium municipal discharges). Section 402(p)(4). These permits shall provide for compliance "as expeditiously as practicable, but in no event later than 3 years after the date of issuance of such permit." Id.

Section 402(p) also specified the levels of control to be incorporated into storm water permits. Permits for discharges associated with industrial activity are to require compliance with all applicable provisions of Sections 301 and 402 of the CWA, i.e., all technology-based and water quality-based requirements. Section 402(p)(3)(A). By contrast, permits for discharges from municipal separate storm sewers "shall require controls to reduce the discharge of pollutants to the maximum extent practicable" ("MEP"). Section 402(p)(3)(B)(iii).

2. Analysis

A. WQ-based Requirements in Municipal Storm Water Permits

The relationship of Section 402(p)(3)(B)(iii) to Section 301(b)(1)(C) is not clear, either on the face of the statute or in legislative history. Section 402(p)(3) is clearly intended to

draw a distinction between the requirements on industrial and municipal storm water discharges. Section 402(p)(3)(A) states that industrial discharges shall comply with the applicable provisions of section 301, i.e., BAT/BCT technology-based requirements as well as any more stringent WQ-based requirements pursuant to 301(b)(1)(C). In the next sub-paragraph, Congress requires municipalities to control storm water to the MEP standard; no mention is made of section 301. The juxtaposition of (p)(3)(A) and (p)(3)(B) gives rise to the argument that Congress may have intended to waive all section 301 requirements for municipal discharges in favor of the MEP standard. On the other hand, one could read (p)(3)(B)(iii) as modifying only technology-based requirements for municipal storm water (i.e., MEP substitutes for BAT/BCT); any WQ-based requirements would still be necessary in a municipal permit, even if those requirements are more stringent than "practicable." The legislative history of Section 402(p) provides no guidance as to how Congress intended the MEP standard to operate.

Where Congressional intent behind a statutory provision is ambiguous in light of the language or legislative history, the Agency charged with administering that statute may adopt any reasonable interpretation consistent with the goals and purposes of the statute. Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984). Therefore, EPA has a large degree of discretion to choose how it will interpret the applicability of WQS to municipal storm water discharges. EPA has already indicated that WQS would continue to apply to permits for municipal storm water discharges. See, e.g., 53 Fed. Reg. 49,457 (Dec. 7, 1988) (priorities for controls in municipal storm water management programs will be developed to ensure achievement of water quality standards and the CWA). We believe this interpretation to be a reasonable one, for the following reasons.[1]

First, to support the opposite reading (i.e., that WQ-based requirements do not apply to municipal storm water permits), one would have to assert that Congress implicitly waived section 301(b)(1)(C) requirements for municipal storm water. Implied repeals of statutory provisions are generally disfavored. Morton v. Mancari, 417 U.S. 535, 549 (1974). A court generally will find a statute impliedly repealed only if the later enacted provision is in "irreconcilable conflict" with the earlier provision. Kremer v. Chemical Construction Corp., 456 U.S. 461, 468 (1982) (citations omitted). In this case, the statutory provisions are not in irreconcilable conflict; rather, as

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[1]. Of course, given that Chevron applies to this analysis, the Office of Water would have some flexibility to decide to adopt the opposite position on this issue. We do not understand, however, that OW desires such a result. Any such change in Agency interpretation would, of course, require adequate explanation.

discussed above, one may read Section 301(b)(1)(C) as requiring "any more stringent limitation" necessary to meet a WQS in every NPDES permit, including those permits subject to the MEP standard. Such a reading would harmonize the two provisions and give effect to the policy behind Section 301(b)(1)(C),, i.e., to ensure that WQS are met, regardless of practical considerations (such as the availability of treatment technology or the "practicability" of MS4 permit requirements).

To read Section 402(p)(3)(B) as overriding 301(b)(1)(C) requirements would also cause a conflict between Section 402(p) and the general focus of the provisions in the 1987 Amendments, many of which reflect a Congressional desire to improve compliance with the WQ-based requirements of the Act. The amendments to/additions of sections 303(c)(2)(B), 304(1), 319, 320, 402(o) all reflect Congressional concern with the improvement of water quality through the NPDES and other CWA programs. It would be particularly difficult to argue that the storm water provisions, a major part of the 1987 Amendments, were intended to create an exemption from the general rule regarding WQ-based requirements without an explicit acknowledgment of that result. We think the approach taken in the proposed rule is preferable.

B. Compliance Date for WQ-Based Limits in Municipal Storm Water Permits

In contrast to the issue of whether WQ-based requirements apply at all to MS4s, Congress had indeed spoken to the compliance date issue. Section 402(p)(4) requires compliance with all permit conditions no later than three years from the date of issuance. In light of the express language, we believe the Agency may reasonably interpret the three-year compliance provisions in Section 402(p)(4) to apply to all permit conditions, including those imposed under 301(b)(1)(C).[2]

There are arguments which support this interpretation as the preferred reading. First, EPA has issued few, if any storm water permits to MS4s to date. Many of these systems will face NPDES permit conditions for the first time, and I understand immediate compliance for these systems is likely to be unrealistic. The compliance date in Section 402(p)(4) apparently reflects a Congressional realization of that reality. Second, EPA has already construed another very similar provision of the 1987 Amendments in the same manner. Section 304(1) establishes an

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[2]. There may be some municipal separate storm sewer systems which are unable to meet even the three-year compliance date in their permits. The Agency retains the discretion to issue an administrative order fixing a schedule for compliance if compliance is not achieved in that three-year period.

identical three-year compliance date for achieving water quality standards in Individual Control Strategies issued under that section. EPA has interpreted that provision, while not repealing Section 301(b)(1)(C), to allow for three-year compliance with new effluent limits established to meet WQS on 304(l)-identified streams. 54 Fed. Reg. 23,889 (Jun. 2, 1989). Given that 304(l) deals directly with WQ-based standards and permit requirements, a consistent interpretation with respect to 402(p)(3) and (p)(4) (which, as we have seen, is silent on the role of WQ-based requirements for MS4s) is certainly reasonable.

The decision of the Administrator in the Star-Kist permit appeal does not affect this analysis. Indeed, the decision itself supports the reading that compliance schedules under Section 304(l) (and, by extension, schedules under Section 402(p)(4)) are unaffected by the holding in that decision. Cf. Order on Petition for Reconsideration, In the Matter of Star-Kist Caribe, Inc., NPDES Appeal No. 88-5, at 6 n.5 (because decision does not prevent all post-1977 compliance schedules, arguments regarding 304(l) are not pertinent).

If you have any questions regarding this memorandum, please contact Randy Hill of my staff, FTS 382-7700.

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